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(1)

No. 97-1266

In The Supreme Court Of The United States

OCTOBER TERM 1997

PATENT OFFICE PROFESSIONAL ASSOCIATION,
Petitioner,

v.

FEDERAL LABOR RELATIONS AUTHORITY,
Respondent.

On Petition For Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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SUPREME COURT, U.S.

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48 pp

QUESTIONS PRESENTED

1. Are some decisions made by the General Counsel of the Authority subject to judicial review under 5 U.S.C. 7123?

2. Did D.C. Circuit err in concluding, contrary to *Montana Air Chapter No. 29, Association of Civilian Technicians v. Federal Labor Relations Authority*, 898 F.2d 753 (CA9 1990) which is based on *Heckler v. Chaney*, 470 U.S. 821, 833 n.4 (1985), that no decision made by the General Counsel of the Authority is subject to judicial review?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page. Petitioner is the Patent Office Professional Association (POPA or Union), an exclusive representative under Chapter 71 of title 5 of the United States Code. The Federal Labor Relations Authority (Authority or FLRA) is the Respondent.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1997

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINION BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit in case No. 96-1277 appears at Appendix A to the petition and is reported at 128 F.3d 751 (CADC 1997).

JURISDICTION

The date on which the United States Court of Appeals decided case No. 96-1277 was November 7, 1997.

The jurisdiction of this Court is invoked under 5 U.S.C. 7123(c) and 28 U.S.C. 1254(1).

STATUTES AND REGULATIONS INVOLVED

5 U.S.C. 7103. Definitions; applications

(a) For the purpose of this chapter-

* * *

(6) "Authority" means the Federal Labor Relations Authority described in section 7104(a) of this title;

* * *

5 U.S.C. 7123. Judicial review

(a) Any person aggrieved by any final order of the Authority other than an order under-

(1) section 7122 of this title (involving an award by an arbitrator), unless the order involves an unfair labor practice under section 7118 of this title, or

(2) section 7112 of this title (involving an appropriate unit determination),

may, during the 60-day period beginning on the date on which the order was issued, institute an action for judicial review of the Authority's order in the United States court of appeals in the circuit in which the person resides or transacts business or in the United States Court of Appeals for the District of Columbia.

* * *

The remainder of 5 U.S.C. 7123 appears in Appendix B.

5 C.F.R. 2423.7 Investigation of charges.

(a) The Regional Director, on behalf of the General Counsel, shall conduct such investigation of the charge as the Regional Director deems necessary.

* * *

5 C.F.R. 2423.10 Determination not to issue complaint; review of action by the regional Director.

* * *

(b) If the Regional Director determines not to issue a complaint on a charge which is not withdrawn, the Regional Director shall provide the parties with a written statement of the reasons for not issuing a complaint.

* * *

(e) The General Counsel may sustain the Regional Director's refusal to issue or re-issue a complaint, stating the grounds of affirmance, or may direct the Regional Director to take further

action. The General Counsel's decision shall be served on all the parties. The decision of the General Counsel shall be final.

The following other statutes involved in this case appear in Appendix B: 5 U.S.C. 551, 701, 706, 7104, 7105 and 7118.

STATEMENT OF THE CASE

Are some decisions made by the General Counsel of the Authority subject to judicial review? The Ninth Circuit in *Montana Air Chapter No. 29, Association of Civilian Technicians v. FLRA*, 898 F.2d 753 (CA9 1990) (*Montana Air Chapter*) held yes. The D.C. Circuit in this case held no. The D.C. Circuit dismissed this case for lack of subject matter jurisdiction. The law of the D.C. Circuit is in direct conflict with the Ninth Circuit.

Federal Labor-Management Relations

Almost 17 years ago, the Union and the Patent and Trademark Office (PTO or Office), an agency in the Department of Commerce, began the negotiations which led to this case. "This is the latest episode in the interminable struggle of the Association and the Patent Office to reach an agreement on employee performance appraisals, a struggle that started in May 1981." (App. A). The PTO declared Union proposals nonnegotiable. The Authority and the D.C. Circuit resolved the negotiability issues in *POPA and PTO*, 25 FLRA 384 (1987), *aff'd sub nom. POPA v. FLRA*, 868 F.2d 458 (CADC 1988) and *POPA and PTO*, 29 FLRA 1389 (1987), *aff'd sub nom. POPA v. FLRA*, 873 F.2d 1458 (CADC 1989). But then the Union and PTO reached impasse in further negotiations.

In November 1990, an interest arbitrator, acting under the direction of the Federal Services Impasses Panel under 5 U.S.C. 7119(b)(1), issued an award agreement. Under 5 U.S.C. 7114(c) agency head review, the Department of Commerce

disapproved award agreement provisions. The Authority and the D.C. circuit resolved the issues of negotiability and arbitrator jurisdiction for provisions of the award agreement in *POPA and PTO*, 47 FLRA 10 (1993), *aff'd in part and rev'd in part sub nom. POPA v. FLRA*, 26 F.3d 1148 (CADC 1994).

In September 1994, the Union asked the PTO to implement the award agreement, which contained those provisions that had not been disapproved in the agency head review, plus the provisions found negotiable by the Authority but not appealed to the D.C. Circuit. The award agreement would not contain those provisions found nonnegotiable by the Authority or D.C. Circuit. After 13 years of negotiations, arbitration and litigation, the Union wanted implementation of that award agreement, which contained only those provisions that had survived the agency head review and subsequent litigation. There were no other issues left to resolve. The PTO did not respond.

The Federal Labor Relations Authority

In March 1995, the Union filed a unfair labor practice charge with the Authority over the PTO refusal to implement the award agreement, Case No. WA-CA-50352. In December 1995, the Union received the Regional Director's decision not to issue a complaint. In February 1996, the Union filed an appeal of the Regional Director's decision to the General Counsel of the Authority. The Union next received the final decision of the General Counsel, dated June 13, 1996. The General Counsel denied the appeal. After 15 years, according to the general policy of the General Counsel, there was no award agreement to implement, because there was no "meeting of the minds." The Union and PTO needed to begin the process of negotiating over performance appraisals all over again.

The Court of Appeals

On August 12, 1996, the Union filed the Petition for Review with the D.C. Circuit under 5 U.S.C. 7123. The Authority filed a motion to dismiss the Petition for Review for lack of subject

matter jurisdiction. The Authority relied on *Turgeon v. FLRA*, 677 F.2d 937 (CADC 1982) (per curiam) (*Turgeon*) for the motion. The Union filed an opposition to the motion to dismiss. The Union cited *Montana Air Chapter*, which is based on *Heckler v. Chaney*, 470 U.S. 821, 833 n.4 (1985) (*Chaney*), for the proposition that courts of appeals have subject matter jurisdiction to review some decisions made by the General Counsel of the Authority. After briefs were filed, on November 7, 1997, the D.C. Circuit dismissed the Petition for Review for lack of jurisdiction (App. A).

REASONS FOR GRANTING THE PETITION

This Court should grant the petition in order to resolve the conflict between the Ninth Circuit in *Montana Air Chapter*, *supra*, and the D.C. Circuit in this case. In *Montana Air Chapter*, 898 F.2d, at 756, the Ninth Circuit noted that the General Counsel's decision was "presumptively unreviewable." However, the Ninth Circuit did review the General Counsel's decision declining to issue an unfair labor practice complaint and held that "the General Counsel made impermissible statutory and regulatory interpretations which formed the basis of his decision not to issue an unfair labor practice complaint." 898 F.2d, at 763. The Ninth Circuit found exceptions to the presumption that the decision of the General Counsel of the Authority declining to issue an unfair labor practice complaint is not subject to judicial review, citing this Court in *Heckler v. Chaney*, 470 U.S., at 833 n.4 and opinions of the D.C. Circuit. In contrast, the D.C. Circuit dismissed this case and held: "Lest there be any lingering confusion, we write to make clear that, even after *Heckler v. Chaney*, it remains the law of this circuit that a decision of the General Counsel of FLRA not to file a complaint is not judicially reviewable given that the statute provides for review only of decisions of the Authority." (App.

A). In contrast to *Montana Air Chapter*, this means that, for the D.C. Circuit, there can not be judicial review, even when the General Counsel of the Authority "has 'consciously and expressly adopted a general policy' that is so extreme as to amount to an abdication of its statutory responsibilities." *Chaney*, 470 U.S., at 833 n.4. The law of the D.C. Circuit is in direct conflict with the Ninth Circuit.

The Ninth Circuit held that 5 U.S.C. 701(a)(2), rather than (a)(1), applies to decisions of the General Counsel of the Authority. Hence, there is a presumption of no judicial review. Yet there may be exceptions, as in *Montana Air Chapter*. In this case, the D.C. Circuit held that 5 U.S.C. 701 (a)(1), rather than (a)(2), applies to decisions of the General Counsel of the Authority. Hence, for the D.C. Circuit, *Chaney* does not apply. The D.C. Circuit appears to hold that there is no judicial review with no possible exceptions at all.

This case is one of first impression for this Court, because it involves the question of whether some decisions of the General Counsel of the Authority are subject to judicial review. In *NLRB v. United Food & Commercial Workers Union, Local 23*, 484 U.S. 112 (1987) (*United Food*), this Court held that 5 U.S.C. 701(a)(1) precludes judicial review of decisions of the General Counsel of the Board whether to issue complaints, based on an analysis of the National Labor Relations Act (NLRA). However, the General Counsel of the Authority clearly is not the General Counsel of the Board. The relationship of the three members and the General Counsel of the Authority under Chapter 71 of title 5 of the United States Code is significantly different from that of the Board and General Counsel under the National Labor Relations Act. Thus the analysis of this Court in *United Food*, with regard to 5 U.S.C. 701(a)(1), cannot automatically apply to judicial review of decisions of the General Counsel of the Authority. Chapter

71 is a different statute, which requires a different analysis from this Court.

By this case, this Court could clarify whether the General Counsel of the Authority is safe from judicial review even when the General Counsel "has 'consciously and expressly adopted a general policy' that is so extreme as to amount to an abdication of its statutory responsibilities." *Chaney*, 470 U.S., at 833 n.4. The General Counsel of the Authority should follow the correct law. This Court could clarify whether some decisions of the General Counsel are subject to judicial review, in view of *Chaney*.

In particular, this Court could clarify whether the General Counsel of the Authority can disregard Chapter 71 of title 5 of the United States Code without judicial review. This case is important to federal employees, because a union has no way to enforce chapter 71, when the General Counsel of the Authority does not follow the law and there never can be judicial review. A union should have some way to enforce Chapter 71. When a union claims that the General Counsel "has 'consciously and expressly adopted a general policy' that is so extreme as to amount to an abdication of its statutory responsibilities", has made impermissible statutory interpretations, and does not follow chapter 71, then the union should be able to obtain judicial review.

I. Some decisions made by the General Counsel of the Authority are subject to judicial review under 5 U.S.C. 7123.

Under 5 U.S.C. 7123(a), "any final order of the Authority" is subject to judicial review. Under 5 C.F.R. 2423.10: "The decision of the General Counsel shall be final." Since *order* includes decision and *Authority* includes General Counsel of the Authority, some final decisions of the General Counsel of the Authority are subject to judicial review, by statute.

For insight into the crucial need for judicial review in the context of an unfair labor charge, see the statement of House manager William D. Ford in *Legislative History of the Federal Service Labor-Management Relations Statute, Title VII of the Civil Service Reform Act of 1978*, Committee Print No. 96-7, November 19, 1979, pages 999-1000 (*Legislative History*), Congressional Record, Vol. 124, Part 28, October 14, 1978, page 38718:

> "But if, in the beginning or later, the Authority refuses to follow its mandate, we expect the courts to vigorously defend the rights of employees and their representatives under title VII against misinterpretation or half-hearted enforcement by the Authority.
>
> * * *
>
> But when a party arrives in court claiming a failure of the Authority to follow title VII, we expect the court to consider the party's claim and evaluate the Authority's decision thoroughly.
>
> * * *
>
> We are, however, also realistic in our recognition that the Authority's task is far more difficult than that of the National Labor Relations Board. When the Authority is deciding an unfair labor charge against an employer, for example, it is weighing the possible misconduct of another Government agency. We are not blind to the sympathy that may develop between these two Federal entities. But we have made as clear as we can our expectation that the Authority is to perform vigorously its 'special prosecutor' functions.
>
> Moreover, in establishing judicial review we expect that the courts will scrutinize the actions of the Authority with less of the deference given other administrative agencies."

With respect to legislative history, the D.C. Circuit has found the statement of Representative Ford on October 14, 1978 "illuminating". *American Federation of Government Employees, Local 2782 v. FLRA*, 702 F.2d 1183, 1188 (CADC 1983) ("The following statement by Representative Ford is even more illuminating") (Scalia, Circuit Judge, opinion for the court). The above statements of Representative Ford on the need for judicial review are also illuminating.

His reference to "misinterpretation or half-hearted enforcement by the Authority", "When the Authority is deciding an unfair labor charge against an employer", and "our expectation that the Authority is to perform vigorously its 'special prosecutor' functions" indicates the Congress intended some judicial review of decisions of the General Counsel of the Authority. Under 5 U.S.C. 7118, it is the General Counsel of the Authority, rather than the three members, who "shall investigate the charge." The Congress would expect that the General Counsel of the Authority "is to perform vigorously its 'special prosecutor' functions."

Order Includes Decision

Representative Ford referred to "evaluate the Authority's decision thoroughly" rather than the "Authority's order", as in section 7123(a). The Congress did not intend to distinguish between "order" and "decision" in section 7123(a). The Conference Report No. 95-1717, October 5, 1978, stated:

> "B. JUDICIAL REVIEW OF THE DECISIONS OF THE FEDERAL LABOR RELATIONS AUTHORITY
>
> The Senate bill [S.2640] made reviewable in court decisions of the Authority concerning unfair labor practices, including awards of arbitrators relating to unfair labor practices.
>
> * * *

> In the House bill [H.R.11280], unfair labor practice decisions are appealable as in the Senate." *Legislative History*, at 821.

Thus, in 5 U.S.C. 7123(a), from legislative history, "Authority's order" includes Authority's decision.

Under 5 U.S.C. 7123(c): "Review of the Authority's order shall be on the record in accordance with section 706 of this title." Then the definitions under 5 U.S.C. 701 and 551 apply: "order' means the whole or a part of a final disposition, whether affirmative , negative, injunctive, or declaratory in form, of an agency . . . ." Clearly, a final decision may be a final disposition and hence by definition an *order*. The final decision of the General Counsel of the Authority to refuse to issue a complaint is a negative final disposition of the unfair labor practice charge, which decision then by definition is a final *order*.

Thus, in 5 U.S.C. 7123(a), by statute and from legislative history, "Authority's order" includes Authority's decision. Therefore, *order* in section 7123(a) does not preclude a final decision of the General Counsel of the Authority.

Authority Includes General Counsel of the Authority

Also, the Congress did not intend to distinguish between "Authority" and the "General Counsel of the Authority" in section 7123(a). According to 5 U.S.C. 7103(a)(6): "'Authority' means the Federal Labor Relations Authority described in section 7104(a) of this title". Section 7104(a) then has: "The Federal Labor Relations Authority is composed of three members". Thus "Authority" clearly includes the three members of the Authority. Furthermore, section 7104(f)(1) begins: "The General Counsel of the Authority", so that Authority appears to include the General Counsel of the Authority as well. In S.2640, August 24, 1978, section 7203(b) had: "The Authority shall consist of three members" while section 7203(g) had: "There is established within the Authority an Office of General Counsel." *Legislative History*, at 565-566.

The language "within", as in the legislative history, or "of the Authority", as in the statute, indicates that the Congress intended "Authority" to include the General Counsel of the Authority.

Since in 5 U.S.C. 7105, "Authority" must include the General Counsel of the Authority, the same reading must apply to section 7123(a), absent clear and convincing evidence to the contrary. Under section 7105(d), the *Authority* appoints Regional Directors and the *Authority* may delegate to Regional Directors "authority to perform such duties and make such expenditures as may be necessary . . . ." By regulation, such delegation to Regional Directors by the *Authority* includes the authority and duties of the General Counsel of the Authority under 5 U.S.C. 7118(a). Under section 7105(d), such delegation is legally possible only when "Authority" includes the General Counsel of the Authority, because only the General Counsel of the Authority, rather than the three members, has that authority and duty under 5 U.S.C. 7118(a).

Under 5 C.F.R. 2423.7(a):

> "The Regional Director, on behalf of the General Counsel, shall conduct such investigation of the charge as the Regional Director deems necessary."

Under 5 C.F.R. 2423.10(b):

> "If the Regional Director determines not to issue a complaint on a charge which is not withdrawn, the Regional Director shall provide the parties with a written statement of the reasons for not issuing a complaint."

Yet under 5 U.S.C. 7118(a), only the General Counsel has the authority and duty to "investigate the charge" and "provide the the person making the charge a written statement of the reasons for not issuing a complaint." Thus under 5 U.S.C. 7105(d), *Authority* must include the General Counsel of the Authority, because only the General Counsel could delegate the authority and duties of the General Counsel to Regional Directors. The

same reading, that "Authority" includes the General Counsel of the Authority, must apply to section 7123(a), absent clear and convincing evidence. This Court should reject the bizarre interpretation that "Authority" includes the General Counsel in section 7105(d), in order to delegate his authority and duties to Regional Directors, while "Authority" means only the three members in section 7123(a), in order to have no decision of the General Counsel of the Authority subject to judicial review. The same reading for "Authority" must apply to 5 U.S.C. 7105(d) and 7123(a). With the same reading, "Authority" must include the General Counsel of the Authority.

In 5 U.S.C. 7118, the three members are distinguished from the General Counsel of the Authority by context and the mention of member: "Authority (or any member thereof . . .)." However, in section 7123(a), there is just "Authority", with no mention of members. Nor does the context preclude that "Authority" includes the General Counsel of the Authority. Moreover, had the Congress intended to preclude the judicial review of final decisions of the General Counsel of the Authority, presumably the Congress would have added a General Counsel third exception to 5 U.S.C. 7123(a). Thus it is reasonable to presume that the Congress did not intend to distinguish between "Authority" and the "General Counsel of the Authority", absent mention of the members or an explicit General Counsel exception to judicial review in section 7123(a).

Thus, in 5 U.S.C. 7123(a), by statute and from legislative history, "final order of the Authority" includes final decision of the General Counsel of the Authority. Clearly, section 7123(a) does not preclude judicial review of a final decision of the General Counsel of the Authority, under 5 U.S.C. 701(a)(1).

Legislative History of Judicial Review

In S.2640, a union could file "complaints of unfair labor practices . . . with the Authority." *Legislative History*, at 583-584. Then the General Counsel would "make final decisions as

to whether to issue notices of hearing on unfair labor practice complaints and prosecute such complaints before the Authority". *Legislative History*, at 570. In S.2640, what became 5 U.S.C. 7123(a) was section 7216 (f)(1), which stated:

> "Any employee or agency adversely affected or aggrieved by a final order or decision of the Authority with respect to a matter raised as an unfair labor practice under this section, or with respect to an exception filed to any arbitrator's award under section 7221(j) of this title which involves an unfair labor practice complaint, may obtain judicial review of such an order or decision." *Legislative History*, at 584.

The reference to "final decision" as well as "final order" indicates that a final decision of the General Counsel "within the Authority" was intended to be subject to judicial review. The Conference Report, *supra*, *Legislative History*, at 821, indicates that 5 U.S.C. 7123(a) did not change judicial review of unfair labor practice matters from either the Senate bill or the House bill. Hence, the Congress intended that some decisions of the General Counsel of the Authority would be subject to judicial review under 5 U.S.C. 7123. From the statements of Rep. Ford, *supra*, the Congress intended statutory interpretations of the General Counsel of the Authority to be subject to judicial review under 5 U.S.C. 7123.

In Chapter 71, the decision of the General Counsel is not final. This is a significant difference from the NLRA. By statute, the three members of the Authority could probably review statutory interpretations of the General Counsel. However, under 5 C.F.R. 2423.10(e), the decision of the General Counsel of the Authority on statutory interpretations is final. By that regulation, there is no way for a union to obtain review of the General Counsel from the three members of the Authority. So then a union should be able to obtain judicial

review of some decisions of the General Counsel of the Authority under 5 U.S.C. 7123.

Heckler* v. *Chaney

Under 5 U.S.C. 7123(c): "Review of the Authority's order shall be on the record in accordance with section 706 of this title." Thus, the

> "standards to be applied on review are governed by the provisions of § 706. But before any review at all may be had, a party must first clear the hurdle of § 701(a)." *Chaney*, *supra*, 470 U.S., at 828.
>
> "[It] is the Administrative Procedure Act (APA) that codifies the nature and attributes of judicial review, including the traditional principle of its unavailability 'to the extent that . . . agency action is committed to agency discretion by law.' 5 U.S.C. § 701(a)(2)." *Interstate Commerce Commission v. Brotherhood of Locomotive Engineers*, 482 U.S. 270, 283 (1987).

5 U.S.C. 701(a)(1) does not preclude judicial review of a final decision of the General Counsel of the Authority, because no statute in Chapter 71 precludes judicial review. However, under 5 U.S.C. 701(a)(2), the General Counsel's decision declining to issue an unfair labor practice complaint is presumed not subject to judicial review, because an agency decision not to take enforcement action is "committed to agency discretion by law." *Chaney*, 470 U.S., at 832. For the General Counsel of the Authority, that law appears to be 5 U.S.C. 7118 (a)(1): "the General Counsel . . . may issue and cause to be served upon the agency or labor organization a complaint." The word "may" connotes discretion.

However, neither section 7118 (a)(1) nor any other section of Chapter 71 commits statutory interpretations to the discretion of the General Counsel of the Authority. Moreover, it is inconceivable that the Congress would intend that the General Counsel would have discretion to disregard any statute

in Chapter 71 of title 5. From the statements of Representative Ford, *supra*, the Congress intended "misinterpretation or half-hearted enforcement by the Authority" and a "failure of the Authority to follow title VII [Chapter 71]" to be subject to judicial review. There is no reason why the General Counsel should be beyond the law, when exercising discretion under section 7118 (a)(1). Thus 5 U.S.C. 701(a)(2) does not preclude judicial review of all decisions of the General Counsel of the Authority. Such judicial review should not restrict the General Counsel's discretion under section 7118 (a)(1). The General Counsel could follow the law, when exercising discretion under section 7118 (a)(1).

This Court in *Chaney* noted that there may be some judicial review in the context of nonenforcement decisions:

> "We do not have in this case a refusal by the agency to institute proceedings based solely on the belief that it lacks jurisdiction. Nor do we have a situation where it could justifiably be found that the agency has 'consciously and expressly adopted a general policy' that is so extreme as to amount to an abdication of its statutory responsibilities. See *e.g.*, *Adams* v. *Richardson*, 156 U.S. App. D.C. 267, 480 F.2d 1159 (1973) (en banc). Although we express no opinion on whether such decisions would be unreviewable under 701(a)(2), we note that in those situations the statute conferring authority on the agency might indicate that such decisions were not "committed to agency discretion." 470 U.S., at 833 n.4.
>
> "Thus the Court properly does not decide today that nonenforcement decisions are unreviewable in cases where (1) an agency flatly claims that it has no statutory jurisdiction to reach certain conduct, *ante*, at 833, n.4; (2) an agency engages in a pattern of nonenforcement of clear statutory language, as in *Adams* v. *Richardson*, 156

> U.S. App. D.C. 267, 480 F.2d 1159 (1973) (en banc), *ante*, at 833, n.4; . . . . It may be presumed that Congress does not intend administrative agencies, agents of Congress' own creation, to ignore clear jurisdictional, regulatory, statutory, or constitutional commands . . . ." 470 U.S., at 839 (BRENNAN, J., concurring).

The noted exceptions to the nonreviewability presumption involve statutory interpretations by an agency. This Court in *Chaney* did not appear to preclude judicial review of all nonenforcement decisions.

Even a prosecutor should follow the law. Even a prosecutor should not be beyond all judicial review. Even if the refusal of the General Counsel of the Authority to issue a complaint is not subject to judicial review, it is separate and compatible that there is judicial review when the basis of the decision is that the General Counsel "has 'consciously and expressly adopted a general policy' that is so extreme as to amount to an abdication of its statutory responsibilities." 470 U.S., at 833 n.4.

> "It may be presumed that Congress does not intend administrative agencies, agents of Congress' own creation, to ignore clear jurisdictional, regulatory, statutory, or constitutional commands . . . ." 470 U.S., at 839 (BRENNAN, J., concurring).

Unlike the Respondent in *Chaney*, who asked the D.C. District Court to require the Food and Drug Administration (FDA) to take particular enforcement actions, the Union in this case only sought to have the D.C. Circuit rule on statutory interpretations. Hopefully, then the General Counsel of the Authority could follow the correct law, when exercising discretion under section 7118 (a)(1). Without judicial review, there is no assurance that the General Counsel of the Authority will follow the correct law. This Court should clarify whether some decisions of the General Counsel are subject to judicial review.

II. The D.C. Circuit erred in concluding, contrary to *Montana Air Chapter* which is based on *Chaney*, that no decision made by the General Counsel of the Authority is subject to judicial review.

In this case, the D.C. Circuit states: "*Turgeon*'s force continues unabated." (App. A). However, in *Turgeon*, the D.C. Circuit did not consider whether statutory interpretations made by the General Counsel are subject to judicial review. *Turgeon* did not involve a situation as in *Montana Air Chapter*. *Turgeon* did not involve a situation as in this case where the General Counsel of the Authority "has 'consciously and expressly adopted a general policy' that is so extreme as to amount to an abdication of its statutory responsibilities." *Chaney*, 470 U.S., at 833 n.4.

In *Martinez v. Smith*, 768 F.2d 479 (CA1 1985) (per curiam) and *American Federation of Government Employees, Local 1749, v. FLRA*, 842 F.2d 102 (CA5 1988) (per curiam) (*AFGE, Local 1749)*, the First and Fifth Circuits considered subject matter jurisdiction of decisions of the General Counsel. However, neither the First nor the Fifth Circuit considered whether impermissible statutory interpretations of the General Counsel of the Authority are subject to judicial review.

The decision in *Turgeon* was prior to *Chaney*. Although the decisions were after *Chaney*, neither the First nor the Fifth Circuit cited *Chaney*. The Ninth Circuit in *Montana Air Chapter* cited *Chaney*, with regard to judicial review of decisions of the General Counsel. In *Montana Air Chapter*, the Ninth Circuit held that some decisions made by the General Counsel of the Authority are subject to judicial review. In this case, in contrast, the D.C. Circuit considers that *Chaney* does not apply to judicial review of decisions of the General Counsel of the Authority. This Court should grant the petition in order

to resolve the conflict between the Ninth Circuit in *Montana Air Chapter* and the D.C. Circuit in this case.

Subject Matter Jurisdiction

In *Montana Air Chapter*, 898 F.2d, at 756, the Ninth Circuit found that:

> "Agency action is judicially reviewable except when statutes preclude judicial review or when such action is committed to agency discretion by law. 5 U.S.C. §§ 701(a) & 702 (1988). An agency's decision not to take enforcement action generally falls under the second exception and is presumed to be immune from review." citing *Chaney*, 470 U.S., at 832.
>
> "Specifically, the General Counsel's exercise of discretion not to file an unfair labor complaint generally is unreviewable." citing *AFGE, Local 1749* and *Turgeon*.

However, the Ninth Circuit also found that nonenforcement decisions of the General Counsel may be reviewable when:

> "a refusal by the agency to institute proceedings [is] based solely on the belief that it lacks jurisdiction" or "where it justifiably could be found that the agency has 'consciously and expressly adopted a general policy' that is so extreme as to amount to an abdication of its statutory responsibilities."quoting *Chaney*, 470 U.S., at 833 n. 4.

Also, the Ninth Circuit found two exceptions recognized by the D.C. Circuit: "1) agency nonenforcement decisions are reviewable when they are based on a belief that the agency lacks jurisdiction", citing *International Longshoremen's Ass'n. v. National Mediation Bd.*, 785 F.2d 1098, 1100 (CADC 1986); and "2) an agency's statutory interpretations made in the course of nonenforcement decisions are reviewable", citing *International Union, United Automobile, Aerospace & Agricultural Implement Workers of America v. Brock*, 783 F.2d

237, 245 (CADC 1986) (*International Union*). With respect to the General Counsel of the Authority, the Ninth Circuit found:

> "Statutory interpretations promulgated in the course of an agency's nonenforcement also are reviewable in their own right . . . . When the FLRA implements a statutory interpretation in the course of a refusal to issue an unfair labor practice complaint, 'courts are emphatically qualified to decide whether an agency has acted outside of the bounds of reason." *Montana Air Chapter*, 898 F.2d, at 757-758, citing *International Union*, 783 F.2d, at 245.

The Ninth Circuit concluded that impermissible statutory interpretations made by the General Counsel of the Authority are subject to judicial review.

"evaluate the Authority's decision thoroughly"

In *Montana Air Chapter*, the union claimed the General Counsel had made impermissible statutory interpretations of 5 U.S.C. 7116(a) in the context of alleged violations of 5 U.S.C. 7114(c). On judicial review, the Ninth Circuit found that the General Counsel had made statutory interpretations:

> "Thus we find that the General Counsel's decision not to issue an unfair labor practice complaint was based on his belief that he lacked jurisdiction to issue such a complaint. We therefore must examine the General Counsel's statutory and regulatory interpretations to determine if his belief that he lacked jurisdiction was correct." 898 F.2d, at 757.
>
> "We find that the General Counsel issued a new legal interpretation of 5 U.S.C. 7116(a), grafting a bad faith requirement on that section's definition of unfair labor practice in the context of alleged violations of 7114(c). Such an interpretation is subject to judicial review." 898 F.2d, at 758.

On further evaluation, the Ninth Circuit found that the General Counsel had made impermissible statutory interpretations:

> "the General Counsel's decision was based on the mistaken belief that he lacked jurisdiction to issue an unfair labor practice complaint. . . . We also find that the General Counsel made impermissible statutory and regulatory interpretations which formed the basis of his decision not to issue an unfair labor practice complaint." 898 F.2d, at 763.

Discretion under 5 U.S.C. 7118 (a)(1)

The Ninth Circuit preserved the discretion of the General Counsel to issue an unfair labor practice complaint. The Ninth Circuit remanded the case:

> "to direct the General Counsel to exercise his discretion in accordance with this opinion's ruling on those interpretations. We do not hold that the General Counsel must issue an unfair labor practice in this case. We hold only that the General Counsel must consider the merits of the union's claim in accordance with his statutory obligations and decide whether to issue such a complaint." 898 F.2d, at 763.

As shown in *Montana Air Chapter*, the General Counsel has discretion whether to issue an unfair labor practice complaint, when impermissible statutory interpretations are subject to judicial review. *Montana Air Chapter* is consistent with both *Chaney* and the statements of Representative Ford, *supra*, with regard to judicial review of decisions of the General Counsel. *Montana Air Chapter* is consistent with the intent of the Congress. The Ninth Circuit followed the correct judicial proceedings.

The Opinion Below

In contrast to the Ninth Circuit in *Montana Air Chapter*, the D.C. Circuit found (App. A):

> "agency actions are not reviewable under that act [APA] if other 'statutes preclude judicial review,' 5 U.S.C. §701(a)(1), and *Turgeon* definitely establishes such preclusion by the Labor-Management Relations Act [Chapter 71 of title 5 of the United States Code]."

Clearly, the Ninth Circuit did not agree that "*Turgeon* definitely establishes such preclusion", since the Ninth Circuit cited *Turgeon* for the proposition: "Specifically, the General Counsel's exercise of discretion not to file an unfair labor complaint generally is unreviewable." *Montana Air Chapter*, 898 F.2d, at 756. Thus, the Ninth Circuit cited *Turgeon* to support that 5 U.S.C. 701(a)(2), rather than (a)(1), applies to decisions of the General Counsel of the Authority. Moreover, in view of *Turgeon*, the Ninth Circuit did review the General Counsel's decision declining to issue an unfair labor practice complaint in *Montana Air Chapter*. Thus it is not correct to say that "*Turgeon* definitely establishes such preclusion", since *Turgeon* clearly did not persuade the Ninth Circuit of "such preclusion."

Furthermore, the standard to show preclusion is *clear and convincing evidence*, as this Court noted with regard to 5 U.S.C. 701(a)(1) in *Chaney*, 470 U.S., at 830:

> "In this case, there is no indication that Congress sought to prohibit judicial review and there is most certainly no 'showing of "clear and convincing evidence" of a . . . legislative intent' to restrict access to judicial review." quoting *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410 (1971), citing *Abbott Laboratories v. Gardner*, 387 U.S. 136, 141 (1967).

Turgeon could not have presented clear and convincing evidence that 5 U.S.C. 701(a)(1) applies, because the Ninth Circuit, which cited *Turgeon*, clearly was not convinced in *Montana Air Chapter*. Along with the Ninth Circuit, this Court

also should not be convinced that *Turgeon* establishes that section 701(a)(1) applies.

According to the D.C. Circuit in this case, 5 U.S.C. 7123(a) itself is a statute which precludes judicial review under 5 U.S.C. 701(a)(1):

> "In *Turgeon*, this court declared flatly that it has no jurisdiction to review decisions by the General Counsel of FLRA declining to issue unfair labor practice complaints because such decisions do not constitute final orders of the agency. *See Turgeon*, 677 F.2d at 938-939.
>
> * * *
>
> Lest there be any lingering confusion, we write to make clear that, even after *Heckler v. Chaney*, it remains the law of this circuit that a decision of the General Counsel of FLRA not to file a complaint is not judicially reviewable given that the statute provides for review only of decisions of the Authority.
>
> * * *
>
> Nothing in *Heckler* - and especially not the Association's favored footnote - affects the reviewability of decisions of the General Counsel under the Labor-Management Relations Act, and this court has already held that the statute does not allow judicial review of the General Counsel's decision not to issue unfair labor practice complaints. *See Turgeon*, 677 F.2d at 939." App. A.
>
> "Since the General Counsel has not issued a complaint, and the Authority has not acted at all in this case, it is clear that there is no 'final order of the Authority' and hence no decision that we can review pursuant to section 7123." *Turgeon*, 677 F.2d at 939.

However, a final decision of the General Counsel of the Authority is a "final order of the Authority", because "order" includes decision and "Authority" includes the General Counsel

of the Authority. In this case, the General Counsel has acted by not issuing a complaint. By definition under 5 U.S.C. 701 and 551, the final decision of the General Counsel, which is the final negative disposition of the unfair labor practice charge, is a *final order*. Section 7123(a) does not preclude judicial review of that final decision of the General Counsel of the Authority. Section 7123(a) instead provides for judicial review of final orders of both the three members and the General Counsel of the Authority. Contrary to the D.C. Circuit in this case, section 7123(a) does not preclude judicial review of a final decision of the General Counsel of the Authority, under 5 U.S.C. 701(a)(1). *Turgeon* does not present clear and convincing evidence that 5 U.S.C. 7123(a)(1) shows such preclusion, since the Ninth Circuit, which cited *Turgeon*, clearly was not convinced in *Montana Air Chapter*.

The opinion of the D.C. Circuit has an unstated underlying premise that, in section 7123(a), "order" does not include decision and "Authority" does not include the General Counsel of the Authority. However, a premise is not evidence at all, least of all clear and convincing evidence. The opinion of the D.C. Circuit has no showing that the premise is correct by clear and convincing evidence. Faced with "any final order of the Authority" in 5 U.S.C. 7123(a), the question asked should have been whether "order" includes decision and "Authority" includes the General Counsel of the Authority. Instead of an analysis of the question, the D.C. Circuit has just assumed the answer is no as the major premise of the opinion in this case.

In *Turgeon*, the D.C. Circuit states: "Similarly, under the Act in question here, the decisions of the General Counsel are not denominated 'orders.'" 677 F.2d at 940. This then leads to the D.C. Circuit's premise that "order" in section 7123(a) does not include decision. However, under 5 U.S.C. 701 and 551, by definition a final decision of the General Counsel of the Authority, which is a final negative disposition, is a *final order*.

Hence, by statute, the premise of the D.C. Circuit is wrong. Also under 5 U.S.C. 7105(d), *Authority* must include the General Counsel of the Authority, because only the General Counsel could delegate the authority and duties of the General Counsel to Regional Directors. The same reading for "Authority" must apply to 5 U.S.C. 7105(d) and 7123(a). With the same reading, *Authority* must include the General Counsel of the Authority. Thus the D.C. Circuit relied on the wrong premise. Consistent with *Montana Air Chapter*, but contrary to the opinion in this case, "final order of the Authority" includes final decision of the General Counsel of the Authority.

A wise premise to adopt is:

> "It may be presumed that Congress does not intend administrative agencies, agents of Congress' own creation, to ignore clear jurisdictional, regulatory, statutory, or constitutional commands . . . ." 470 U.S., at 839 (BRENNAN, J., concurring).

The opinion of the D.C. Circuit provides no reason why the Congress would intend that the General Counsel of the Authority may ignore any statute of Chapter 71 of title 5, without judicial review. Based on *Chaney*, the Ninth Circuit has the better position: "the General Counsel's exercise of discretion not to file an unfair labor complaint generally is unreviewable." *Montana Air Chapter*, 898 F.2d, at 756. However, there may be exceptions. *Montana Air Chapter* is an example exception. The D.C. Circuit should have determined whether this case is another exception.

This Court should grant the petition in order to resolve the conflict between the Ninth Circuit in *Montana Air Chapter* and the D.C. Circuit in this case, in favor of the Ninth Circuit. Consistent with *Chaney*, 470 U.S., at 833 n.4, this Court should find that the law of the D.C. Circuit should be that 5 U.S.C. 701(a)(2), rather than (a)(1), applies to a final decision of the

General Counsel of the Authority declining to issue an unfair labor practice complaint.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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30 January 1998